R.D. # 0001-00
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

B.T.A. PROPERTIES, INC.[1]
Employer

and CASE 22-RC-11844

PRODUCTION WORKERS UNION LOCAL 148, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act

[1] The name of the Employer appears as corrected at the hearing.
[2] A brief filed by the Petitioner has been fully considered. No other briefs were filed.

and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization involved claims to represent certain employees of the Employer.[4]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time special class employees including carpenters, painters, plasterers, electricians, plumbers, tile repairers and appliance repairers employed by the Employer at its Brick Tower 685 Martin Luther King Boulevard and 715 Martin Luther King Boulevard and Milford Apartments 83 Milford Avenue, Newark, New Jersey locations, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.[5]

The Employer, contrary to the Petitioner, contends that an existing contractual relationship between the parties which specifically excludes the employees sought herein should be construed as an agreement by the Petitioner not to represent those employees. Further, contrary to the Petitioner, the Employer asserts that all of the

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[3] The Employer, a New Jersey corporation, is engaged in the management and rental of various properties including residential housing at its 685 and 715 Martin Luther King Boulevard and 83 Milford Avenue, Newark, New Jersey locations, its only locations involved herein.

[4] The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[5] The unit description is in accord with the stipulation of the parties which I find to be appropriate for purposes of collective bargaining. There are approximately nine (9) employees in the unit.

employees sought are temporary employees and, therefore, not eligible to vote in an election.

The record reveals that the Employer and the Petitioner are parties to a collective bargaining agreement which covers "all production and maintenance employees, and truck drivers, excluding: (a) clerical and office employees, (b) guards, (c) professional employees, (d) supervisors, as defined in the Labor Management Relations Act of 1947, as well as (e) Special Class workers as defined in Sec. b) hereunder." It is undisputed that the employees sought in the instant petition are special class employees. This collective bargaining agreement is effective from January 1, 1997 to December 31, 1999.

The Board has held that a contract in which a union agrees not to seek representation of certain employees bars a petition by that union for the specified employees during the life of that agreement. *Briggs Indiana Corporation*, 63 NLRB 1270 (1945) (commonly referred to as the Briggs Indiana rule). The contract itself must contain an express promise on the part of the union to refrain from seeking representation of the employees at issue. *The Cessna Aircraft Company,* 123 NLRB 855 (1959). Such a promise will not be implied from a mere unit exclusion, such as here. *The Budd Company,* 154 NLRB 421 (1965); *Cessna Aircraft*, supra. Based on the above, noting that there is no evidence that the Petitioner expressly agreed to refrain from representing the sought after employees, I find that the Petitioner did not waive its right to represent the petitioned for employees.

There remains for consideration the Employer's contention that all of the employees in the sought after bargaining unit are temporary employees and, therefore,

are not eligible to vote in an election. The record reveals that the Employer is engaged in the management and rental of residential housing. The Employer is subjected to periodic and ongoing inspections by municipal, state and federal agencies. In October 1999, the Employer acknowledges that it had "thousands" of inspection violations that had to be repaired. These include for example, carpentry, plumbing and electrical repair projects. The Employer acknowledges that new repair projects arise on an ongoing basis as a result of periodic inspections by various governmental agencies. The special class employees are engaged in this ongoing repair work. The record reveals that there has been a complement of 9 special class employees employed by the Employer since at least October 1999, when the current property manager, Sherryl Hines, became employed. It is undisputed that the 9 special class employees employed at the time of the hearing were hired as special class employees on the dates noted below opposite their respective names:

NAME	DATE OF HIRE
Kenneth Jacobs	8/01/98
Charles Peart	8/08/98
Luis Sanabria	8/22/98
Trevor Delapara	1/05/99
Glenn Jefferson	5/01/99
Calvin Davis	6/12/99
Roman Perez	6/15/99
Johnny Brown	10/22/99
Edward Delecruz	12/23/99

The Employer contends that special class employees are hired to perform work for a "few months" but because of continuing violations from ongoing inspections, these employees are employed for a longer duration. Although the Employer asserts that special class employees' employment will end upon completion of their assignments, Property Manager Hines stated that she was "…unable to determine how

long that could be based on the violations…" that the Employer is required to repair. In this regard, Hines further testified that as of the date of the hearing she had no information to determine when the employment of the special class employees currently employed would terminate.

The Employer proffered into evidence statements signed by eight of the above noted special class employees indicating that they had been hired on a temporary basis.[6] These statements were not executed at the time of hire. It is undisputed that at least three of these statements were signed on the morning of the instant hearing, namely the statements of Kenneth Jacobs, Johnny Brown and Edward Delecruz. The Employer proffered no evidence to support its assertion that special class employees, at the time of hire, are advised that their employment is of a temporary nature. In this connection, Hines admitted that she hired Edward Delecruz but could not recall if she advised him that his position was temporary. Kenneth Jacobs, a special class employee (painter) hired on August 1, 1998, testified, without contradiction, that he was never advised at the time of hire that his position was temporary. Jacobs signed the statement proffered by the Employer, as noted above, on the morning of the instant hearing, January 6, 2000. He further testified that he has worked at least 40 hours a week since the commencement of his employment. The Employer acknowledges that special class employees work a 40 hour week.

The Board has held that the test for determining the eligibility of employees asserted to be temporary is whether they have an uncertain tenure. If the tenure is indefinite and they are otherwise eligible, they are permitted to vote. *United States*

[6] There was no statement submitted for Trevor Delapara.

Aluminum Corp., 305 NLRB 719 (1991); *Lloyd A. Fry Roofing Co.,* 121 NLRB 1433 (1958); *Personal Products Corporation,* 114 NLRB 959 (1955). Based upon the above, and the record as a whole, noting that some of the special class employees have worked for substantial periods of time, that there is no evidence that they were advised of the duration of their employment at the time of hire and that the Employer could not determine the anticipated end of their employment, I find that special class employees are employed for an indefinite duration and, therefore, are eligible to vote in the election herein directed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced

more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Production Workers Union Local 148, AFL-CIO**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before January 21, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations

Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by January 28, 2000.

Signed at Newark, New Jersey this 14th day of January 2000.

/s/Gary T. Kendellen

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Gary T. Kendellen, Regional Director
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